

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,     | ) |                      |
|                          | ) | No. 63463-1-I        |
| Respondent,              | ) |                      |
|                          | ) | DIVISION ONE         |
| v.                       | ) |                      |
|                          | ) |                      |
| J.S. (d.o.b. 1/19/1992), | ) | UNPUBLISHED OPINION  |
|                          | ) |                      |
| Appellant.               | ) | FILED: March 8, 2010 |
|                          | ) |                      |
| _____                    | ) |                      |

Leach, J. — J.S. challenges his conviction of second degree rape, arguing that the trial court misunderstood the affirmative defense that J.S. had a reasonable belief that the victim was of legal age. We disagree and affirm.

FACTS

On April 19, 2008, 16-year-old J.S. had sexual intercourse with 13-year-old H.B. J.S. is three years and five weeks older than H.B. J.S. met H.B. in the summer of 2007 when she was 12 years old. They used the Internet networking site “MySpace” to communicate. J.S. was aware that H.B.’s MySpace page recited that she is 17 years old.

H.B. snuck out of her house around 11:00 p.m. J.S. and his 18-year-old friend, Walter Meranno, picked up H.B. near her home. Meranno noticed that H.B. looked young and asked her age. J.S. heard H.B. respond that she was 15. When the car broke down, J.S. and H.B. walked to his house where they had

sex. Some time earlier, H.B. told J.S. that she was in middle school.

When interviewed by police, J.S. acknowledged he had sex with H.B., but he stated he believed she was 14. He knew she attended middle school and told police that middle school students ranged from 13 to 15. In his written statement, he acknowledged some middle school students were as young as 12.

J.S. did not testify at trial. A friend of J.S. testified that he had told J.S. that H.B. was 14, based on information he received from H.B. J.S. asserted the affirmative defense that he had a reasonable belief that H.B. was of legal age.

At the conclusion of the bench trial, the trial court rejected the affirmative defense. In its oral decision, the court stated that J.S. must show he believed the victim when she told him her age and that the belief was reasonable under all the circumstances. The trial court focused on H.B.'s conflicting statements of her age, her young appearance, and the fact that she snuck out of her house to conclude that it was not reasonable to take H.B.'s word on her age.

When the court entered its written findings of fact and conclusions of law, the court expanded its analysis of the affirmative defense. The court found that J.S. told police he believed H.B. was 14, but "the evidence failed to prove by a preponderance of the . . . evidence that [J.S.] really believed H.B. was at least 14 years old or less than 36 months younger than he was at the time of intercourse."<sup>1</sup>

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<sup>1</sup> Finding of Fact (FF) 7.

Then the trial court found that even if J.S. believed H.B. was 14, such a belief was not reasonable. J.S. knew H.B. was in middle school and knew students in middle school could be as young as 12. J.S. knew H.B. had made conflicting statements about her age, and he knew she wanted the two boys whom she did not know well to pick her up late at night somewhere other than her home. “Under these circumstances, it would not be reasonable to believe any claims H.B. made regarding her age.”<sup>2</sup> Furthermore, the only statements by H.B. as to her age were her claims that she was 17 on her MySpace page and that she was 15 in the car. If J.S. believed H.B. was 14, then he knew her statements that she was 17 and 15 were false. “There were no other age declarations by H.B. upon which to base a belief she was 14 years old or not more than 36 months younger than [J.S.], at the time of intercourse.”<sup>3</sup> Therefore, the court concluded that J.S. failed to prove the affirmative defense.

#### ANALYSIS

Second degree rape includes intercourse with a person who is at least 12 years old “but less than fourteen years old . . . and the perpetrator is at least thirty-six months older than the victim.”<sup>4</sup> As an affirmative defense, the defendant may prove that “the defendant reasonably believed the alleged victim to be [of legal age] based upon declarations as to age by the alleged victim.”<sup>5</sup>

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<sup>2</sup> FF 8.

<sup>3</sup> FF 8.

<sup>4</sup> RCW 9A.44.076.

<sup>5</sup> RCW 9A.44.030(2).

Reasonable belief must be supported by “declarations as to age” made by the victim.<sup>6</sup> The trial court, as finder of fact, is free to weigh the evidence and make credibility determinations, and the reviewing court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence.<sup>7</sup>

J.S. argues that the trial court misunderstood the affirmative defense and ruled on the basis that J.S. had to prove he believed H.B. was a specific age rather than allowing the defense if J.S. believed H.B.’s age was somewhere in the range of the legal age. “[I]t matters not whether J.S. believed that H.B. was 15, 16, 17, or even 14 years old, so long as he reasonably believed she was of some age or age difference outside the parameters established as criminally violative under the crime defined at RCW 9A.44.076. By effectively narrowing the scope of the affirmative defense, the juvenile court committed legal error.”<sup>8</sup>

J.S.’s arguments are not persuasive. The affirmative defense depends upon proof by the defendant that he reasonably believed the victim was of legal age based on statements made by the victim. The only evidence presented of J.S.’s belief was his statement to police that he believed H.B. was 14. The trial court, as finder of fact, expressly rejected the sufficiency of this evidence; “the evidence failed to prove by a preponderance of the . . . evidence that [J.S.] really

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<sup>6</sup> State v. Shuck, 34 Wn. App. 456, 461, 661 P.2d 1020 (1983).

<sup>7</sup> State v. E.J.Y., 113 Wn. App. 940, 952, 55 P.3d 673 (2002).

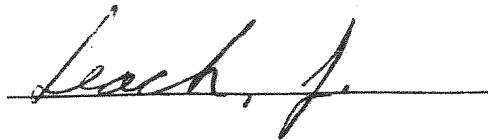
<sup>8</sup> Appellant’s Modified Opening Br. at 16.

believed H.B. was at least 14 years old or less than 36 months younger than he was at the time of intercourse.”<sup>9</sup> Whether J.S. actually believed H.B. was at least 14 or less than 36 months younger than J.S. was a credibility question for the trier of fact and we will not overturn that finding on appeal.

Additionally, the only statements by the victim in evidence were her statement on her MySpace page that she was 17 and her statement in the car that she was 15. J.S. is correct that the defense could be established if the defendant reasonably believed the victim was somewhere within the range of legal age, e.g., 14–17, if that belief is based upon “declarations as to age” by the victim. But, presented with the victim’s conflicting and inconsistent declarations as to her age, the trial court is not compelled to find that the defendant reasonably believed that one of the conflicting statements must be true.

J.S. does not demonstrate that the trial court misunderstood the affirmative defense. Substantial evidence supports the findings of fact.<sup>10</sup> The findings support the conclusion that J.S. failed to prove the affirmative defense.

Affirmed.



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<sup>9</sup> FF 7.

<sup>10</sup> J.S. assigns error to the sufficiency of the evidence to support findings of fact 7 and 8 but does not offer any specific argument on sufficiency. Further, a rational trier of fact, viewing the evidence in the light most favorable to the State, could have made such findings. E.J.Y., 113 Wn. App. at 952.

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WE CONCUR:

Becker, J.